IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MICHAEL SCHUOLER,
Plaintiff/Appellee,

v.

MARK NAPIER, PIMA COUNTY, CURTIS GREENMAN, AND ROBERT FIORE,
Defendants/Appellants.

No. 2 CA-CV 2017-0022
Filed March 6, 2018

Appeal from the Superior Court in Pima County
No. C20140079
The Honorable Sarah R. Simmons, Judge

REVERSED AND REMANDED

COUNSEL

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and

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Pima County Sheriff Mark Napier, Pima County, and deputies Curtis Greenman and Robert Fiore appeal from a judgment against them for injuries plaintiff Michael Schuoler sustained when Greenman shot him.[1] Appellants argue the trial court erred by allowing Schuoler to present a negligence claim to the jury, allowing the post-trial redefinition of the negligence claim to apply only to a self-inflicted cut on Schuoler's throat, and admitting evidence of misconduct of other members of the sheriff's department who investigated the shooting. For the reasons that follow, we reverse and remand for a new trial only on the issue of liability.

Factual and Procedural Background

¶2 We view the evidence "in the light most favorable to the prevailing party [below] and give that party all the reasonable inferences arising from that favorable view of the evidence." *McFarlin v. Hall*, 127 Ariz. 220, 224 (1980). In February 2013, Fiore and Greenman responded to a report of domestic violence at a home in Pima County. At the home, Schuoler's girlfriend told Fiore that Schuoler was outside, locked in a car, and that, on a prior occasion, he had cut himself with a knife. The deputies, believing Schuoler might be suicidal, immediately approached the car, with Fiore approaching the driver's side, and Greenman approaching the passenger side, with his firearm drawn.

¶3 Schuoler appeared to the deputies to be asleep in the driver's seat, covered with a blanket. The driver's door was locked and the windows were raised. Fiore knocked on the driver's window, and Greenman ordered Schuoler to show his hands. Schuoler initially complied, but then reached under the blanket with his right hand,

[1]Schuoler originally sued then-sheriff Christopher Nanos, but later moved to substitute Mark Napier, the current sheriff, as a party pursuant to Rule 27(c)(2), Ariz. R. Civ. App. P.

produced a knife, and cut his own throat. As Schuoler was cutting himself, Fiore saw blood flowing down his shirt, yelled "knife," and attempted to break the window with his flashlight. Greenman later testified he saw Schuoler moving a shiny object towards Fiore, gripping it like a gun. Greenman fired a single shot, which struck Schuoler in the chest.

¶4 Schuoler sued the sheriff, Pima County, Greenman and Fiore for injuries sustained in the shooting. Among other things, he asserted a battery claim against Greenman and a negligence claim against both deputies.[2] The deputies asserted contributory negligence defenses and claimed the shooting was justified.[3] The parties eventually stipulated that the shooting was a battery, disagreeing only about whether it was justified.

¶5 The trial court bifurcated the liability and damages portions of the trial. After a six-day trial, the jury found the shooting was not justified and found in Schuoler's favor on both his battery and negligence claims. It apportioned sixty percent of the fault to Schuoler, thirty-four percent to Greenman, and six percent to Fiore.

¶6 Appellants thereafter filed a renewed motion for judgment as a matter of law and a motion for new trial. Among other arguments, they challenged the fault apportionment, arguing the jury's decision to assign sixty percent of the fault to Schuoler on his negligence claim revealed confusion and a mistaken belief that the fault apportionment would ultimately reduce Schuoler's total damages award.[4] In response, Schuoler argued the fault apportionment could stand based on the evidence that Schuoler cut his own throat, an argument that developed into a purported

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[2]Schuoler initially alleged the sheriff and county failed to properly train and supervise the deputies, and also that they were vicariously liable for the deputies' negligence. At trial, however, the only remaining claims were the negligence and battery claims against the deputies, and a corresponding vicarious liability claim against the sheriff.

[3]*See* A.R.S. §§ 13-410(C) (peace officer's use of deadly force justified "only when the . . . officer reasonably believes that it is necessary . . . [t]o defend himself or a third person from what the . . . officer reasonably believes to be the imminent use of deadly physical force"), 13-413 (no civil liability for justified use of deadly force in law enforcement).

[4]Contributory negligence is not a defense to an intentional tort, including battery. *Frontier Motors, Inc. v. Horrall*, 17 Ariz. App. 198, 201 (1972).

redefinition of the negligence claim to cover damages only for Schuoler's throat injury—damages that he subsequently agreed to waive. The trial court ultimately denied the motions, and explicitly rejected appellants' arguments that the negligence claim was inappropriate and that the jury verdicts were contradictory.

¶7 The trial court conducted a four-day bench trial on damages and entered a judgment in Schuoler's favor, awarding substantial damages for battery against Greenman and the sheriff. In light of Schuoler's waiver, and despite the jury's apportionment of six percent of the fault to Fiore, the court awarded no damages for negligence. Appellants filed a timely motion for new trial, which the court denied, and this appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (5)(a).

Discussion

Evidence of Post-Shooting Investigation

¶8 Because we conclude the admission of evidence of misconduct—i.e., alleged "whitewash" evidence—committed by other sheriff's personnel involved in the investigation of the shooting necessitates reversal and a partial retrial, we address that issue first. We review the admission of evidence for an abuse of discretion, and "[t]he improper admission of evidence is not reversible error if the jury would have reached the same verdict without the evidence." *Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 7 (App. 1998).

¶9 Generally, to be admissible, evidence must be relevant, meaning it must have some tendency to make a material fact "more or less probable than it would be without the evidence." Ariz. R. Evid. 401, 402; *see also Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496 (1987) (evidence is relevant if it alters probability of "consequential fact" actually in dispute). Evidence demonstrating a party's awareness of having a weak or unjust case may be relevant and admissible. *See generally* David B. Harrison, J.D., Annotation, *Admissibility and Effect, on Issue of Party's Credibility or Merits of His Case, of Evidence of Attempts to Intimidate or Influence Witness in Civil Action*, 4 A.L.R. 4th 829 (1981). In particular, "[a]ttempts *by a party* to obtain an advantage in a lawsuit by unfair means are admissible in evidence as an admission of the weakness or unjustness of such party's case." *Good v. City of Glendale*, 150 Ariz. 218, 219 (App. 1986) (emphasis added). The actions of a non-party, however, have limited relevance as to a party's credibility or awareness of the merits of the case. *See* Harrison, *supra*, §§ 6, 8(b), at 849-50, 856-57.

¶10 In *Good*, the plaintiff alleged several municipal police officers wrongfully entered his home and shot him. 150 Ariz. at 219. The county attorney filed criminal charges against Good but offered him a plea agreement with no jail time, allegedly to elicit a guilty plea to be used against him in a potential civil lawsuit. *Id.* at 219-20. Acknowledging that the county attorney's conduct could be considered attempted witness intimidation, we nevertheless concluded it was reversible error to admit the evidence where there was no indication the county attorney was acting on behalf of the defendant city. *Id.* at 220; *see also Davis v. Duran*, 277 F.R.D. 362, 369 (N.D. Ill. 2011) ("[W]hether another police officer thought there was something to cover up does not tend to prove either that there was something that needed to be whitewashed or that the investigating officer's assumption in that regard was more likely true than not.").

¶11 The "whitewash" evidence in this case includes a number of actions by individuals other than Greenman and Fiore. For example, another member of the sheriff's department charged Schuoler with aggravated assault on a law enforcement officer despite the absence of probable cause. Also, two deputies visited Schuoler at the hospital multiple times, attempting to obtain a statement and medical release, despite his life-threatening injuries and his attorney's explicit request that law enforcement not contact him. During one such unauthorized visit, a deputy started to read Schuoler his *Miranda*[5] rights despite the absence of probable cause to detain him, told him multiple lies to try to "gain his confidence," and surreptitiously recorded the encounter.[6]

¶12 The evidence of the post-shooting investigation described above generally fails the test of relevance, *see* Ariz. R. Evid. 401, because it

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[5]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[6]The investigating deputies admitted under oath that they used their authority to manipulate Schuoler in the hospital in order to obtain information, employing the same tactics they would use with a criminal suspect. Other examples of post-shooting conduct included investigating deputies asking Greenman leading questions that allegedly prompted him to claim he believed Schuoler had a gun and that he shot Schuoler to protect Fiore, a detail he did not mention in his initial interview. Investigators also suggested to Fiore that Schuoler could have attacked him through the closed car window. And, investigators allowed Greenman's defense attorney to ask questions during his interview, allegedly to influence the outcome in his favor.

focuses on the actions of individuals other than the deputies at the time of the shooting.[7] Moreover, it is not admissible to show that Greenman and Fiore attempted to gain "an advantage . . . by unfair means" because there is no evidence they themselves did anything to influence the investigation. *See Good*, 150 Ariz. at 219. Schuoler's contention that the evidence is admissible simply because Greenman, Fiore, and the investigators are all employed by the sheriff's department is unpersuasive. Greenman and Fiore faced trial as individually named defendants, and were entitled to a fair trial—one free of influence based on other deputies' conduct.

¶13 In addition, Schuoler elicited expert testimony from a "police practices expert" that the post-shooting investigation "fell below a reasonable standard of care." The trial court also permitted another expert, an attorney, to offer a legal opinion about whether there was probable cause to charge Schuoler with assault.

¶14 A court should reject expert testimony that does not assist the jury "to understand the evidence or to determine a fact in issue." Ariz. R. Evid. 702(a). It should also reject expert testimony that invades the province of the jury by telling it how to decide. *See* Ariz. R. Evid. 704 cmt. to 1977 r.; *Webb v. Omni Block, Inc.*, 216 Ariz. 349, ¶¶ 12-14 (App. 2007). Although expert opinions may encompass an ultimate issue when they are otherwise helpful to the jury, they may not do so when they are "couched as legal conclusions" because of the risk that the jury "may turn to the expert for guidance on applicable law rather than the judge." *Webb*, 216 Ariz. 349, ¶¶ 12, 17.

¶15 The expert testimony at issue here served to reiterate the impropriety of the investigation, including "whitewash" evidence, and included inappropriate legal conclusions concerning a lack of probable cause to charge Schuoler with assault and the reasonableness of Greenman's belief that Schuoler was holding a firearm. These issues were virtually indistinguishable from the ultimate issue concerning justification,

[7]A significant portion of the evidence Schuoler presented at trial was devoted to the irrelevant "whitewash" evidence. Three separate witnesses—two investigating officers and one expert—testified solely about the post-shooting investigation. He also devoted nearly half of his opening statement and one third of his closing argument to discussing the "whitewash" evidence.

and the testimony should have been excluded as improper opinion testimony. *See id.* ¶ 17.[8]

¶16 We thus conclude the trial court abused its discretion by categorically allowing evidence of the investigators' misconduct, as well as the improper opinion testimony noted above. *See Brown*, 194 Ariz. 85, ¶ 7. The volume and character of this evidence, including the deceptive, unethical treatment of Schuoler and the bringing of a groundless charge for aggravated assault, created an unacceptable danger of misleading the jury into finding against appellants for the investigators' misconduct, rather than based on the shooting and pre-shooting events. The court in *Good* characterized the admission of evidence of similar though less extreme tactics by a non-party as "highly prejudicial and . . . reversible error." 150 Ariz. at 220. Here, because we cannot conclude the jury would have reached the same verdict without exposure to the inadmissible evidence, a new trial is necessary. *See Brown*, 194 Ariz. 85, ¶ 7.[9]

¶17 We agree, however, with Schuoler's contention at oral argument that any retrial should be limited to the issue of liability and that we should leave the trial court's determination of the total amount of damages undisturbed. Appellants have the burden to prove error on appeal, and we are required to affirm the trial court's decision if it is legally correct for any reason. *Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193 (App. 1992). Here, appellants neither appealed nor identified any error with respect to the trial court's determination of damages. Thus, they have waived any challenge to the damages findings by failing to argue the issue on appeal. Ariz. R. Civ. App. P. 13(a)(7)(A) (appellate brief must contain argument with citation to authority); *FIA Card Servs., N.A. v. Levy*, 219 Ariz. 523, n.1 (App. 2008) (failure to develop argument on appeal constitutes abandonment); *cf. United Bank of Ariz. v. Mesa N. O. Nelson Co.*, 121 Ariz. 438, 443 (1979) (declining to consider argument not raised in opening brief).

¶18 Further, a partial retrial is appropriate when, as we find to be the case here, "the issues are not inextricably intertwined and can be

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[8] Appellants contend that Schuoler has failed to respond to this argument, thereby conceding the issue, and we agree. *See State ex rel. McDougall v. Superior Court* (*Blendu*), 174 Ariz. 450, 452 (App. 1993) (failure to respond to opponent's "debatable issue" on appeal may be deemed confession of error).

[9] Our disposition of this matter does not prohibit proper use of the appellant deputies' statements for impeachment at trial.

separated without prejudice to the parties."[10] *Englert v. Carondelet Health Network*, 199 Ariz. 21, ¶ 15 (App. 2000); *cf. Saide v. Stanton*, 135 Ariz. 76, 80 (1983) (damages ordinarily severable absent "contamination" of liability verdict). In this instance, it should not be difficult for the trial court to apply the existing damages award to any potential verdicts arising from the retrial of liability, including apportioning fault in connection with any negligence verdicts. A retrial of liability only is therefore appropriate under these circumstances.

Concurrent Litigation of Battery and Negligence Claims

¶19 As noted, appellants also argue the trial court erred by allowing Schuoler to present a negligence claim to the jury and should have granted their motions brought pursuant to Rules 50 and 59, Ariz. R. Civ. P. They assert that Schuoler's negligence claim and "meaningless apportionment of fault" deflected the jury's attention from the issue of whether the shooting was justified and led it to believe, wrongly, that the fault apportionment would ultimately reduce appellants' obligations to pay damages, thus "mislead[ing] the jury into thinking that it had a 'compromise' option of awarding only a portion of Schuoler's damages." Ordinarily, we review a trial court's ruling on a Rule 50 motion for judgment as a matter of law de novo, *Goodman v. Physical Res. Eng'g, Inc.*, 229 Ariz. 25, ¶ 6 (App. 2011), and a ruling on a motion for new trial under Rule 59 for an abuse of discretion, *McBride v. Kieckhefer Assocs.*, 228 Ariz. 262, ¶ 16 (App. 2011).[11] In this case, however, because we conclude the erroneous admission of evidence necessitates reversal, we decline to address appellants' arguments concerning the concurrent litigation of claims for battery and negligence.[12]

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[10]In connection with the liability trial, Schuoler represented that the injuries he claimed for negligence and battery were identical—the injuries arising from the shooting.

[11]To the extent appellants seek a new trial based on alleged juror confusion about the ability to reduce Schuoler's damages, they have waived the issue by failing to request further deliberations pursuant to Rule 49(f)(1), Ariz. R. Civ. P., before the jury was excused. *See Trustmark Ins. Co. v. Bank One, Ariz., NA*, 202 Ariz. 535, ¶¶ 39-40 (App. 2002) (objection to inconsistent verdicts waived if not raised before court excuses jury, in order to promote judicial efficiency and discourage jury shopping).

[12]Appellants' argument is based on the premise that a plaintiff may not sue a law enforcement officer for "negligent use of force," an argument

¶20 For purposes of providing guidance to the parties and the trial court for retrial, however, we briefly discuss appellants' assertion that the trial court erred by adopting a previously undisclosed theory to limit negligence damages to injuries caused by Schuoler's self-inflicted knife wound in order to "cure" having sent the negligence claim to the jury. This negligence theory was not disclosed until after the liability verdict. Although the trial court appears to have rejected the theory, it is important to reiterate that such post-trial changes are generally inappropriate.

¶21 According to Rule 16(g)(2)(B), Ariz. R. Civ. P., the parties' joint pretrial statement must identify all "contested issues of fact and law that" either party asserts are material or applicable. The joint pretrial statement supersedes the pleadings and "controls the subsequent course of the litigation." *Carlton v. Emhardt*, 138 Ariz. 353, 355 (App. 1983). Similarly, a party must timely disclose the factual basis of the party's claims, "the legal theory on which each" claim is based, and "a computation and measure of each category of damages." Ariz. R. Civ. P. 26.1(a)(1)–(2), (7). Finally, absent good cause, a party generally may not rely on undisclosed "information . . . at trial, at a hearing, or with respect to a motion." Ariz. R. Civ. P. 37(c)(1); *see also Jimenez v. Wal-Mart Stores, Inc.*, 206 Ariz. 424, ¶¶ 8-9 (App. 2003) (allowing new legal theory to unfairly surprise opponent would be abuse of discretion).

Disposition

¶22 For the above reasons, we reverse the judgment and remand for a new trial only on the issue of liability. We leave the trial court's determination of the total amount of damages undisturbed. As the

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another panel of this court recently rejected in *Ryan v. Napier*, 243 Ariz. 277, ¶¶ 11, 15 (App. 2017). In *Ryan*, which is currently the subject of a petition for review by the Arizona Supreme Court, this court observed that "it is the plaintiff's prerogative to identify particular harms . . . [and] theories of liability," and acknowledged "that a single incident or course of conduct may give rise to multiple possible theories of liability." *Id.* ¶ 13. The court concluded that a plaintiff may assert a negligence claim for injury caused when a law enforcement officer's decision to use force "fell below the standard of care of a reasonable officer under the circumstances." *Id.* ¶¶ 14-15. Our disposition of this matter neither precludes Schuoler from asserting negligence claims in the proceedings on remand, nor removes from the trial court the responsibility of determining in the first instance the effect, if any, to be given to Schuoler's waiver of damages for negligence.

prevailing parties, appellants are entitled to costs on appeal pursuant to A.R.S. § 12-341, subject to compliance with Rule 21(b), Ariz. R. Civ. App. P.